APPENDIX A.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION No. 68-1063, SECTION B

CLAY L. SHAW

versus

JIM GARRISON individually, and as District Attorney for the Parish of Orleans, State of Louisiana, and JAMES L. ALCOCK, individually and as Executive Assistant District Attorney for the Parish of Orleans, State of Louisiana, and CHARLES R. WARD, individually, and as an Assistant District Attorney for the Parish of Orleans, State of Louisiana.

TEMPORARY RESTRAINING ORDER.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to 28 U.S.C. § 2284(3), that the Defendants Jim Garrison, James L. Alcock, and Charles R. Ward, and each of them and their respective assistants, associates, attorneys, employees, agents, officers and assigns be, and they are hereby, ENJOINED AND RESTRAINED from taking any further action in the prosecution of the case entitled "State of Louisiana v. Clay L. Shaw," Number 198-059 on the Docket of the Criminal District Court for the Parish of Orleans, State of Louisiana, pending the further orders of this Court.

REASONS.

The complaint herein (a 47-page document of 116 paragraphs) presents allegations of numerous deprivations of the petitioner's federal rights by the defendant District Attorneys within the context of, or connected with, the criminal prosecution pending against him in the state court for conspiracy to murder the late President Kennedy. The complaint read as a whole presents much more than a recitation of isolated wrongs, but impugns the entire prosecution against the petitioner and attempts to raise the actions of the defendants, prior to and during the present criminal proceedings, to the level of a concerted pattern of persecution of the petitioner and the wholesale and willful disregard of the petitioner's constitutional rights. The complaint states that "the petitioner requires a 'sanctuary' in this Court to grant him relief from the irreparable harm, clear and imminent, which he has suffered at the hands of the defendants herein since March 1, 1967," (Count 4 of the Complaint), during which time, "the defendants * * * have * * * conducted themselves and their office in such a manner as to create an atmosphere of fear and suspicion concerning the motives and actions of the Office of the District Attorney for the Parish of Orleans" (Count 88); that "the defendants, and in particular, Defendant Garrison, are conducting a reign of terror by the misuse and abuse of the powers of the public offices which they hold, by conducting an illegal, unwarranted, fraudulent and useless probe of the as-

sassination of the late John F. Kennedy," (Count 96), that "the erstwhile Kennedy assassination probe being conducted by the defendants is indistinguishable from the case" against the petitioner (Count 97), and that "although plaintiff has been the primary victim of the machinations of the defendants through the abuse and misuse of the power of their respectve offices, many others have felt the impact of their reign of terror, and the case of State vs. Shaw is now and has for sometime past been of tremendous public importance, not only to the citizens of this community, but to all citizens of the United States and to the world." (Count 98).

The thrust of these allegations raises serious questions concerning the relationship between this federal district court and the Louisiana Criminal District Court in which the prosecution against the plaintiff is lodged, and indeed between federal and state courts across the nation. Whenever a federal court stays the hand of a state official, the delicate balance of comity, so necessary and wholesome for our federal system, is likely to be disturbed. The delicacy of the comity issue is not only greatly increased, but augmented by the now-entrenched principles of equity law, see *Ex parte Young*, 209 U.S. 123, 161-162 (1908), when the state agency involved is a court of law and the state official an esteemed member of the state judiciary. But as delicate as the comity balance must be, the points of reference on which it rests today are in a process of continual development, along lines sketched by

Dombrowski v. Pfister, 380 U.S. 479 (1964). At this stage in the development of the law and the possible future developments indicated by the Supreme Court, we are not prepared to rule out the possibility of a remedy for this plaintiff under the state of facts he presents in his petition. And because there is a very real likelihood that the plaintiff may prevail on the merits, and because in view of the plaintiff's allegations of the unconstitutionality of various pertinent Louisiana statutes a three-judge court is required in this matter in the interest of the State of Louisiana, see Wright on Federal Courts § 50, p. 162, and it may not be possible for the hearing before that court to be held and concluded prior to the scheduled date of the trial of the plaintiff in the state court to the possible irreparable injury of the plaintiff, we grant the motion for temporary restraining order pending a speedy hearing on the motion for preliminary injunction.

The so-called "anti-injunction statute," 28 U.S.C. §2283, is based on the obvious premise that a federal court can conceivably be authorized to stay a state proceeding in the interests (in which federal courts have a paramount interest) of the protection of federal constitutional rights.[1] The question whether § 2283 can be accepted a step further to either (a) not prohibit the stay of a state criminal prose-

[1] This would follow, *inter alia*, not only from the fact that Congress saw a need to bolster equity considerations, cf. *Ex parte Young, supra*, with this general prohibition, but also from the recognized power of the federal Congress to provide for exclusive jurisdiction of federal constitutional matters in the federal courts, cf. Wright on Federal Courts, § 10, p. 22.

cution along the lines of *Dombrowski*, or (b) authorize such a stay, is not something which can easily be resolved in the light of comments in *Dombrowski* and the more recent case of *Cameron v. Johnson*, 36 U.S.L.Week 4319 (April 23, 1968). In *Dombrowski*, the court found it "unnecessary to resolve the question whether suits under 42 U.S.C. § 1983 (1958 ed.) come under the 'expressly authorized' exception to § 2283." 380 U.S. at 484 n.2.[2] In *Cameron* the court upheld the denial of injunctive relief against state prosecutions by the district court, and noted

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[2] Of course, aside from the question of what constitutes an "express authorization" within the terms of § 2283 and the question of whether or not 42 U.S.C. § 1983 is such an express authorization, there seems to be a serious question whether any express authorization is necessary in view of the equitable origins of § 2283. The leading case on the subject, apart from the sparse comments by the Supreme Court in *Dombrowski* and *Cameron*, is *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964). There, the court noted that: "Since the statute [§ 2283] was fathered by the principles of comity, it has been held that the statute should be read in the light of those principles and, though absolute in its terms, is inapplicable in extraordinary cases in which an injunction against state court proceedings is the only means of avoiding grave and irreparable injury." 337 F.2d at 593. The *Baines* case preceded the Supreme Court's decision in *Dombrowski*, and the Fourth Circuit therefore had no occasion to consider whether its holding that § 2283 "is not always absolute" might be coterminous with the authority of the federal courts to enjoin prospective state criminal proceedings recognized in *Dombrowski*. Of particular importance to our decision here, the court in *Baines* stated: "Recognizing that the command of § 2283 is not always absolute, we granted a temporary injunction pending appeal of this case. * * * Such an injunction was essential if the controversies were not to become moot while these appeals were being perfected, heard, and determined in this court. We concluded that it was such an extraordinary situation that issuance of a temporary injunction staying prosecutions in the state courts pending our disposition of this appeal was authorized notwithstanding § 2283." 337 F.2d at 593-594.

"Our per curiam [which had previously remanded the case for reconsideration] stated, 381 U.S. 741-742: 'On remand, the district court should first consider whether 28 U.S.C. § 2283 bars a federal injunction in this case, see 380 U.S. at 484, n.2. If § 2283 is not a bar, the court should then determine whether relief is proper in light of the criteria set forth in *Dombrowski*.' The district court held that § 2283 prohibited the court from enjoining or abating the criminal prosecutions initiated against the appellants prior to the filing of the suit on April 13, 1964, and further, that 42 U.S.C. § 1983 creates no exception to § 2283. 262 F.Supp. 873, 878. We find it unnecessary to resolve either question and intimate no view whatever upon the correctness of the holding of the district court." 36 U.S.L. Week 4320, n.3.

Given this state of the law, the real possibility of a determination in the plaintiff's favor by the three-judge court which, under the law, should be the court to determine the issue, and the irreparable harm which may accrue to the plaintiff by the initiation of his trial prior to the three-judge hearing, we think equity demands, and the proprietary interest of the federal courts authorize, whatever short delay of the state trial we now grant.

Nor do we think, apart from the issues posed by § 2283 and *Ex parte Young, supra, Dombrowski v. Pfister* precludes the possibility that the plaintiff

may prevail. *Dombrowski*, in fact, has greatly enlarged the possibility of federal injunction of state criminal prosecutions. The case does contain much language which seems to limit the possibility to cases where First Amendment rights are endangered. Nonetheless, a too narrow interpretation of *Dombrowski*, attempting to limit its thrust solely to cases where First Amendment rights are jeopardized, would dilute the major and fundamental premise of the decision. In *Dombrowski*, the court referred to cases declining to enjoin state prosecutions as follows:

> "In such cases it 'does not appear that the plaintiffs have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, nor that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursuant to this court.' *Douglas v. City of Jeanette* [319 U.S. 157] at 164. But the allegations in this complaint depict a situation in which defense of the state's criminal prosecution will not insure adequate vindication of constitutional rights." 380 U.S. at 485.

Plainly, the court considered an injunction against the state proceeding warranted simply because the criminal prosecution could not serve as an adequate vehicle for the protection of the rights

which the prosecution itself had allegedly endangered. It does not seem to be essential to the *Dombrowski* holding that the court continued to find specifically that the prosecution there has the effect of impairing the plaintiffs' freedom of expression; other federal rights should be equally entitled to protection where a finding of irreparable injury, which cannot be safeguarded within the context of the criminal proceeding, is warranted.

The pervasive allegations of the petitioner here that his prosecution by the defendants is totally without foundation, we think raise the definite reasonable possibility of a finding on the merits that his rights cannot be vindicated within the context of his state prosecution. It is true that the petitioner has not complained of the infringement, by this prosecution, of any specific federal constitutional right which is not part and parcel of the criminal proceedings in the state court.[3] But the petitioner certainly does complain about "illegal, unwarranted, fraudulent, and useless" actions directed, against his person and the totality of his freedom, by agents of the State of Louisiana acting in their official capacity. The compartmentalization of the totality of a person's "right to be let alone" by the state may be helpful generally in the development of a coherent body of law under the various civil rights

[3] It is, of course, at the heart of the *Dombrowski* finding of "irreparable injury" sufficient to justify an injunction against a state proceeding, that the plaintiffs be "threatened with [some substantial] injury other than that incidental to every criminal proceeding brought lawfully and in good faith." 380 U.S. at 485.

amendments to the Constitution, but the trend is not always conducive to the adequate protection of individual liberty; the Supreme Court has strongly indicated that the "concept of liberty" is not to be tied down merely to the recitation of the conventional freedoms stratified in specific guarantees in the Bill of Rights where substantial unjust interference by the state with personal liberty is involved, see *Griswold v. Connecticut*, 381 U.S. 479 (1965). In short the plaintiff's complaint raises real issues of alleged deprivations of liberty through the actions of the state, the correction of which, if proven, might well require *Dombrowski* relief.

FREDERICK J. R. HEEBE,
UNITED STATES DISTRICT
JUDGE

New Orleans, Louisiana.

May 28, 1968 at 2:10 P.M.

APPENDIX B.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION No. 68-1063, SECTION B

CLAY L. SHAW
vs.
JIM GARRISON, individually, et al.

BEFORE: AINSWORTH, Circuit Judge, and HEEBE and COMISKEY, District Judges.

PER CURIAM:

The plaintiff Clay L. Shaw is under indictment in the Criminal District Court for the Parish of Orleans, Louisiana, for having "wilfully and unlawfully conspire[d]. . .to murder John F. Kennedy." He has filed this suit against Jim Garrison, District Attorney for the Parish of Orleans, and two of his assistants for declaratory and injunctive relief in an effort to arrest the prosecution. He was initially charged on March 1, 1967 by the defendant Garrison with participating in a conspiracy to murder President Kennedy. Thereafter on March 14, 1967 a preliminary hearing was held in the State court before a three judge panel to determine whether there was sufficient evidence to establish probable cause to charge Shaw with conspiracy.

The State offered four witnesses, one of whom, Perry Raymond Russo, testified that he was present when the plaintiff and Lee Harvey Oswald and David William Ferrie conspired to kill the Presi-

dent. Another witness, Vernon Bundy, stated that he saw plaintiff having a conversation with Oswald near Lake Pontchartrain in New Orleans. The three-judge panel ruled that sufficient evidence had been presented to establish probable cause that a crime had been committed and to justify continuing the prosecution against the plaintiff. On March 22, 1967, plaintiff was indicted for conspiracy to murder John F. Kennedy by the Orleans Parish Grand Jury. On August 1, 1967, the defendants moved to select a trial date, but on September 27, 1967, plaintiff asked for a continuance, or a change of venue. A hearing was held on the motion and upon the suggestion of the defendants Garrison and Alcock, the court granted a continuance until February, 1968. On February 19, 1968, citing the great publicity the case had received, the plaintiff moved the Criminal District Court to order a change of venue. An extensive evidentiary hearing was conducted by the trial judge after which the motion was denied on April 4. The Supreme Court of the State of Louisiana denied plaintiff's application for writs of certiorari on the question of venue on April 23, 1968. The trial was then set for June 11, 1968.

Now, on May 27, 1968, nearly 15 months after the plaintiff was originally charged, he filed this suit asking for an injunction against the prosecution for which trial was set on June 11, 1968. A temporary restraining order against taking any further action in the prosecution was issued by one member of our panel on May 28, 1968, after which this three-judge court was constituted to hear the case.

Plaintiff's complaint contains numerous allegations of constitutional infirmities in the State prosecution against him. He contends that the preliminary hearing was illegal because it was heard before a three-judge state court, which was not authorized by the Louisiana statutes concerning preliminary hearings; that the defendants made a search of plaintiff's premises and confiscated much of his property under the authority of an illegally issued search warrant; that the indictment was returned on insufficient evidence; that he is prejudiced by the considerable publicity which this case has received; and that the state court has unjustly denied his application and supplemental application for a bill of particulars. He asks that this court declare as unconstitutional Articles 402,[1] 403,[2] 409,[3] and 413[4]

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[1] "Art. 402. *Service of women as jurors*

A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service."

[2] "Art. 403. *Exemption from jury service*

The following persons are exempt from jury service, but the exemption is personal to them and is not a ground for challenge:

(1) The governor, lieutenant governor, state comptroller, state treasurer, secretary of state, superintendent of public education, their clerks and employees, the members, officers, and clerks of the legislature, and the judges and active officers of the several courts of this state;

(2) Any other public official, if jury service would seriously interfere with the performance of his official duties;

(3) Attorneys-at-law, peace officers, ministers of the gospel, physicians and dentists actively engaged in the practice of their professions, school teachers, school bus drivers, pharmacists, members of paid fire departments, and persons who are required to travel regularly and routinely in the course and scope of their employment;

(4) Persons who because of age, sickness, or other physical infirmity would suffer serious detriment if required to serve as a juror; and

of the Louisiana Code of Criminal Procedure and Article VII, Section 41 of the Louisiana Constitution of 1921,[5] which provisions deal with the qualifications

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(5) Persons who have served as grand or petit jurors in criminal cases or as trial jurors in civil cases during a period of twelve months immediately preceding their selection for jury service."

[3] "Art. 409. *Selection of general venire in Orleans parish*

"In the Parish of Orleans, the jury commission shall select impartially at least seven hundred fifty persons having the qualifications to serve as jurors, who shall constitute the general venire.

A list of the persons so selected shall be prepared and certified by the commission as the general venire list and shall be kept as part of the records of the commission.

The name and address of each person on the list shall be written on a separate slip of paper which shall be placed in a box labeled 'General Venire Box.'

No drawing shall be made from a general venire containing fewer than seven hundred fifty names, except when the court orders the drawing of tales jurors.

After the jury commission has selected the general venire, it shall lock and seal the general venire box and deliver it to the secretary of the commission, as the custodian thereof."

[4] "Art. 413. *Method of impaneling of grand jury; selection of foreman*

The grand jury shall consist of twelve persons qualified to serve as jurors, selected or drawn from the grand jury venire.

In parishes other than Orleans, the court shall select one person from the grand jury venire to serve as foreman of the grand jury. The sheriff shall draw indiscriminately and by lot from the envelope containing the remaining names on the grand jury venire a sufficient number of names to complete the grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filling vacancies as provided in Article 415.

In the Parish of Orleans, the court shall select twelve persons from the grand jury venire, who shall constitute the grand jury. The court shall thereupon select one of the jurors to serve as foreman."

[5] "Art. 7 §41. *Selection of jurors; women jurors; trial by judge; trial by jury*

The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall

and manner of selection of jurors. He also attacks the constitutionality of Articles 433[6] and 434[7] of the Louisiana Code of Criminal Procedure, which arti-

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be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

[6] "Art. 433. *Persons present during grand jury sessions*

A. Only the following persons may be present at the sessions of the grand jury:

(1) The district attorney and assistant district attorneys, or any one or more of them;

(2) The witness under examination;

(3) A person sworn to record the proceedings of, and the testimony given before, the grand jury; and

(4) An interpreter sworn to translate the testimony of a witness who is unable to speak the English language.

B. No person, other than a grand juror, shall be present while the grand jury is deliberating and voting.

C. A person who is intentionally present at a meeting of the grand jury, except as authorized by Paragraph A of this article, shall be in constructive contempt of court."

[7] "Art. 434. *Secrecy of grand jury meetings*

Members of the grand jury, all other persons present at a grand jury meeting, and all persons having confidential access to information concerning grand jury proceedings, shall keep secret the testimony of witnesses and all other matters occurring at, or directly connected with, a meeting of the grand jury. However, after the indictment, such persons may reveal statutory irregularities in grand jury proceedings to defense counsel, the district attorney, or the court, and may testify concerning them. Such persons may disclose testimony given before the grand jury, at any time when permitted by the court, to show that a witness committed perjury in his testimony before the grand jury. A witness may discuss his testimony given before the grand jury with counsel for a person under investigation or indicted, with the district attorney, or with the court.

Any person who violates the provisions of this article shall be in constructive contempt of court."

cles deal with grand jury proceedings. He further contends that Articles 484[8] and 485[9] of the Louisiana Code of Criminal Procedure are unconstitutional; these provisions are concerned with bills of particulars. He also asks that Articles 627[10] and 912[11] of

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[8] "Art. 484. *Bill of particulars.*

A motion for a bill of particulars may be filed of right before trial or within ten days after arraignment, whichever is earlier. After expiration of the ten-day period the court may permit the filing of such a motion until the commencement of trial. When a motion is filed, or on its own motion, the court may require the district attorney to furnish a bill of particulars setting up more specifically the nature and cause of the charge against the defendant.

Supplemental bills of particulars or a new bill may be ordered by the court at any time before the trial begins.

When a bill of particulars is furnished, it shall be filed of record and a copy of the bill given to the defendant."

[9] "Art. 485. *Effect of inconsistent or limiting allegations of bill of particulars.*

If it appears from the bill of particulars furnished under Article 484, together with any particulars appearing in the indictment, that the offense charged in the indictment was not committed, or that the defendant did not commit it, or that there is a ground for quashing the indictment, the court may on its own motion, and on motion of the defendant shall, order that the indictment be quashed unless the defect is cured. The defect will be cured if the district attorney furnishes, within a period fixed by the court and not to exceed three days from the order, another bill of particulars which either by itself or together with any particulars appearing in the indictment so states the particular as to make it appear that the offense charged was committed by the defendant, or that there is no ground for quashing the indictment, as the case may be."

[10] "Art. 627. *Appeals*

If a change of venue is granted to the defendant over the objection of the state, or if the court denies an application by the state for a change of venue, the state shall have the right to appeal from the ruling, within the legal delays for making a motion for an appeal before a trial on the merits. Prior to sentence the defendant may not appeal from a ruling changing or refusing to change the venue."

[11] "Art. 912. *Judgments or rulings appealable*

A. Only a final judgment or ruling is appealable.

B. The state cannot appeal from a verdict of acquittal. Adverse judgments or rulings from which the state may

the same code, which deny the defendant the right to appeal from the denial of a motion for change of venue, be declared unconstitutional. He then shifts his constitutional assault to the Louisiana Criminal Code and asserts that LSA-R.S. 14:26,[12] Lou-

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appeal include, but are not limited to, judgments or rulings on:

(1) A motion to quash an indictment or any count thereof;

(2) A plea of time limitation;

(3) A plea of double jeopardy;

(4) A motion in arrest of judgment;

(5) A motion to change the venue;

(6) A motion to recuse; and

(7) An order in an extradition proceeding.

C. The judgments or rulings from which the defendant may appeal include, but are not limited to:

(1) A judgment which imposes sentence;

(2) A ruling upon a motion by the state declaring the present insanity of the defendant; and

(3) A ruling ordering the defendant to be extradited."

[12] "R.S. 14:26. *Criminal conspiracy.*

Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.

Where the intended basic crime has been consummated the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar a prosecution for the other.

Whoever is a party to a criminal conspiracy to commit a crime punishable by death or life imprisonment, shall be imprisoned at hard labor for not less than one nor more than twenty years.

Whoever is a party to a criminal conspiracy to commit the crimes of theft or of receiving stolen things shall be fined not more than two hundred dollars, or imprisoned for not more than one year, or both.

Whoever is a party to a criminal conspiracy to commit any other crime shall be fined or imprisoned, or both, in the same manner as for the offense contemplated by the conspirators; but such fine or imprisonment shall not exceed one-half of the largest fine, or one-half the longest term of imprisonment prescribed for such offense, or both."

isiana's conspiracy statute (under which plaintiff was indicted), is unconstitutional because of vagueness, in that it is written in broad, general and indefinite language and the penalties for the crime are not certain. He also contends that 14:26 is void because it does not define the word "crime" as contained in the statute or designate what crimes the statute has reference to when it states that a conspiracy to commit crime is a criminal offense. In a memorandum filed in opposition to a motion to dismiss subsequently brought by the defendants, plaintiff also attacks the conspiracy statute as being violative of the First Amendment right of freedom of speech. Plaintiff alleges that he is suffering irreparable injury because of the pending criminal prosecution and prays that it be enjoined. In an amendment to his complaint plaintiff further alleges that defendants are not prosecuting him in good faith but "have charged him solely and only for the purpose of using him as a vehicle to the forum which they sought for their attacks on the Warren Report." Plaintiffs also claim that the defendants "are not motivated by an expectation of securing a valid conviction," but their actions are part of a plan to harass plaintiff from asserting his rights to free speech and assembly and to "harass any and all individual citizens who disagree with their theories as to the assassination of President Kennedy, how the assassination came about, who participated in the assassination, the political consequences of the death of the President, and the integrity of the members of the Warren Commission."

In the amended complaint plaintiff also adds Article 782[13] of the Louisiana Code of Criminal Procedure to the list of provisions which he claims are unconstitutional. This article states, *inter alia*, that cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict.

Plaintiff has also requested that we grant a declaratory judgment decreeing that the report of the Warren Commission to the President of the United States, pursuant to Executive Order No. 11130, is valid, accurate and correct, binding and controlling upon all courts of the United States, and admissible in evidence in the state court prosecution. In addition, plaintiff prays that we grant a mandatory injunction against the defendants compelling them to furnish to plaintiff certain documents relative to the prosecution.

I.

After the suit was filed, plaintiff filed a motion to join the Attorney General of the United States under

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[13] "Art. 782. *Number of jurors composing jury; number which must concur*

Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict. Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict. Except as provided in Article 780, trial by jury may not be waived."

Rule 19 of the Federal Rules of Civil Procedure[14] as a defendant or an involuntary plaintiff, and the court's jurisdiction was invoked under 28 U.S.C.

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[14] "Rule 19.

(a) *Persons to be Joined if Feasible.*

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.*

If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.*

A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.*

This rule is subject to the provisions of Rule 23. As amended Feb. 28, 1966, eff. July 1, 1966."

§1361[15] which grants to federal district courts original jurisdiction of any action in the nature of mandamus to compel an officer of the United States or any agency thereof to perform a duty owed to the plaintiff, and §1391(e),[16] relating to venue requirements for civil actions in which officers of the United States, or any agency thereof are defendants. Plaintiff argues that 28 U.S.C. §509[17] vests all functions of officers of the Department of Justice in the Attorney General. He then cites 28 U.S.C. §547, which provides:

"Except as otherwise provided by law, each United States attorney, within his district, shall

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15 "28 U.S.C. §1361. *Action to compel an officer of the United States to perform his duty*

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

16 "28 U.S.C. §1391(e) *Venue generally*

"(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.'

17 "28 U.S.C. §509. *Functions of the Attorney General*

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General. . . ."

> . . .(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned:. . ."

The Court has strong reservations as to whether, by virtue of §509, the Attorney General, rather than the United States Attorney for the Eastern District of Louisiana, may be joined. But it is not necessary that we dispose of that question, as we are of the opinion that neither the Attorney General nor the United States Attorney may be joined in this case under §547.

Under §547 the plaintiff argues that it is a proceeding with which the United States is concerned. Plaintiff argues that this is such a case because of the defendants' attempts to discredit the Report of the Warren Commission and several officers and agencies of the United States Government and their alleged effort to destroy the confidence of the American people in the government of the United States. Plaintiff also reiterates that the validity of the Warren Report is an issue in this case since he has asked for a declaratory judgment as to its accuracy.

The United States Attorney for the Eastern District of Louisiana has informed the Court that the Attorney General objects to being made a party to this suit. In pleadings which were subsequently filed by the United States Attorney it is suggested that the Court lacks jurisdiction over the Attorney General;

that the venue is improper; that 28 U.S.C. §1361 and Rule 19 of the Federal Rules of Civil Procedure are inapplicable to this case; and that there is no justifiable case or controversy as far as the Attorney General is concerned. It is unnecessary that we consider these questions further because of our belief that we cannot interfere with the Attorney General's decision which would constitute an infringement by us upon the discretion of the executive branch of the United States government. The Attorney General's absolute discretion in deciding whether or not to prosecute criminal cases was confirmed by the Fifth Circuit Court of Appeals in *Smith v. United States*, 375 F.2d 243 (5th Cir., 1967). In our opinion, the Attorney General and the executive branch of the government have the same discretion in deciding whether the United States is concerned in particular civil action. In *Newman v. United States*, 382 F.2d 479, 482 (D.C.Cir., 1967), a case involving the duties of the United States Attorney, the Court of Appeals for the District of Columbia said:

> "It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oaths; and while this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors.
>
> "The remedy lies ultimately within the establishment where power and discretion reside. The

> President has abundant supervisory and disciplinary powers—including summary dismissal—to deal with misconduct of his subordinates; it is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers."

We agree with this statement and accordingly deny the plaintiff's motion to compel the Attorney General to be made a party to this action.

II.

The defendants filed a motion to dismiss the plaintiff's action for failure to state a claim upon which relief can be granted. Since Documents outside the pleadings, namely, exhibits and a complete transcript of the state preliminary hearing, are being considered, we treat this as a motion for a summary judgment.

The defendants argue that this suit should be dismissed because 28 U.S.C. §2283[18] prohibits a federal court from enjoining pending state court proceedings. On the other hand, the plaintiff contends that §2283 should not apply because of the exceptional circumstances he has alleged.

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[18] "28 U.S.C. §2283. *Stay of State court proceedings*

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In deciding whether the circumstances alleged by plaintiff entitle him to the injunctive relief, it is first necessary to consider some of the more important cases dealing with the question of when federal courts may enjoin state court criminal prosecutions. In *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S. Ct. 877, 87 L.Ed. 1324 (1943), plaintiffs, Jehovah's Witnesses, brought a suit in the federal district court to restrain threatened criminal prosecution of them in the state courts by the city and its mayor for violation of a city ordinance prohibiting the solicitation of orders for merchandise without first procuring a license from the city authorities and paying a license tax. Plaintiffs were distributing religious pamphlets without obtaining a license and were threatened with prosecution under this ordinance unless they procured licenses. They alleged that the ordinance was an unconstitutional abridgement of free speech, press and religion in violation of the First Amendment. Although in *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, 87 L.Ed. 1292 (1943), decided on the same day as *Douglas*, the Supreme Court declared the same ordinance unconstitutional, it refused to hold in the *Douglas* case that an injunction should issue against any threatened state prosecutions. The Court stated that federal courts should refuse "to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent injury which is clear and imminent. . ." 319 U.S. at 163, 63 S.Ct. at 881. The Court went on to

say, "No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance may be determined as readily in the criminal case as in a suit for an injunction." *Ibid.* The Court found that the declared intention to institute prosecutions against plaintiffs was not sufficient to establish irreparable injury in the circumstances of that case.

In *Stefanelli v. Minard*, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951), the Supreme Court held that a federal injunction should not issue against using allegedly illegally seized evidence in a state criminal trial and gave this clear statement of the considerations governing the federal policy against enjoining state prosecutions:

> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum with review if need be to this Court, to deter-

> mine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution." 342 U.S. at 123, 72 S.Ct. at 121-122.

This language was quoted with approval by the Supreme Court in *Cleary v. Bolger*, 371 U.S. 392, 83 S.Ct. 385, 9 L.Ed.2d 390 (1963), in which the Court held that it was improper to enjoin a state official from presenting certain evidence in a state court criminal prosecution. The court said, "The withholding of injunctive relief against this state official does not deprive respondent of the opportunity for federal correction of any denial of federal constitutional rights in the state proceedings. To the extent that such rights have been violated, cf., e.g., Mapp v. Ohio, supra, he may raise the objection in the state courts and then seek review in this Court of an adverse determination by the New York Court of Appeals. To permit such claims to be litigated collaterally, as is sought here, would in effect frustrate the deep-seated federal policy against piecemeal review." 371 U.S. at 400-401, 83 S.Ct. at 390.

The principles formulated by the jurisprudence through *Cleary v. Bolger* may be briefly summarized at this point. According to these cases the mere fact that the plaintiff was claiming that his constitutional rights were being violated was not a ground for such an injunction. In addition to such a claim, a plaintiff must show that he would suffer irreparable injury which is clear and imminent. Only such a showing would create the exceptional case or special circumstances in which an injunction should issue. The question of what would constitute irreparable injury had never been answered. Under these cases it is apparent that the danger of a conviction, standing alone, did not constitute irreparable injury because constitutional infirmities in the trial could be reviewed in the various remedies thereafter available to the defendant, such as appeal to the Louisiana Supreme Court, writ of certiorari to the United States Supreme Court, and writs of habeas corpus to state and federal courts.

Then came *Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), in which the Supreme Court found one of the exceptional cases or special circumstances alluded to in the *Douglas* case. The plaintiffs, the Southern Conference Educational Fund, Inc. (SCEF), two of its officers, and an attorney for SCEF, filed suit in a United States District Court, requesting an injunction against imminent prosecutions and threats of such prosecution under the Louisiana Communist Propaganda Control Law and the Louisiana Subversive Activities

and Communist Control Law. The complaint alleged that the statutes were unconstitutionally vague and that defendants—the Governor, police and law enforcement officers, and the Chairman of the Legislative Joint Committee on Un-American Activities in Louisiana—had threatened prosecutions in bad faith solely for the prupose of discouraging civil rights activities. The plaintiffs claimed that the threats to enforce these statutes against them were made without any expectation of securing valid convictions, but rather were part of a plan to harass and discourage them and their supporters from asserting the constitutional rights of Negro citizens of Louisiana. Past events convinced the Court that the plaintiffs' freedom of expression had been subjected to a chilling effect. In October, 1963, the two officers of SCEF and SCEF's attorney were arrested by Louisiana state and local police and charged with violations of the two statutes. Their offices were raided and their records and files were seized. Later in October a state judge quashed the arrest warrants as not based on probable cause and discharged the plaintiffs. Subsequently, the state court granted a motion to suppress the seized evidence on the ground that the raid was illegal. Louisiana officials continued, however, to threaten prosecution of the plaintiffs, who thereupon filed suit in a federal district court. A three-judge court was constituted to hear the case. Shortly after the court was convened, a grand jury was summoned in the Parish of Orleans to hear evidence looking to indictments of the plaintiffs. At this

point one of the members of the three-judge court issued a temporary restraining order against any further prosecutions, but subsequently a majority of the court dismissed the complaint and dissolved the temporary restraining order. Thereafter the grand jury returned indictments under the Louisiana Subversive Activities and Communist Control Law against the plaintiffs. The Supreme Court was concerned over the adverse effect which these events had upon the operations of SCEF:

> "These events, together with repeated announcements by appellee that the appellant organization is a subversive or Communist-front organization, whose members must register or be prosecuted under the Louisiana statutes, have, appellants allege, frightened off potential members and contributors. . . Seizures of documents and records have paralyzed operations and threatened exposure of the identity of adherents to a locally unpopular cause. . . Although the particular seizure has been quashed in the state courts, the continuing threat of prosecution portends further arrests and seizures, some of which may be upheld and all of which will cause the organization inconvenience or worse. . . .Not only does the complaint allege far more than an 'injury other than that incidental to every criminal prosecution brought lawfully and in good faith, but appellants allege threats to enforce statutory provisions other than those under which indict-

ments which have been brought. Since there is no immediate prospect of a final state adjudication as to those other sections—if, indeed, there is any certainty that prosecution of the pending indictments will resolve all constitutional issues presented—a series of state criminal prosecutions will not provide satisfactory resolution of constitutional issues." 380 U. S. at 488-489, 85 S.Ct. at 1122.

In these exceptional circumstances the Court held that a case of "the threat of irreparable injury required by traditional doctrines of equity" was made out, 380 U. S. at 490, 85 S.Ct. at 1123, and it ruled that "the district Court erred in holding that the complaint fails to allege sufficient irreparable injury to justify equitable relief." 380 U. S. at 489, 85 S.Ct. at 1122. The Court held further that certain sections of the Louisiana Subversive Activities and Communist Control Law were patently unconstitutional on their face and remanded with direction to frame an appropriate injunction restraining prosecution of the indictments obtained under this law.

The most recent Supreme Court case in this area is *Cameron v. Johnson,* 88 S.Ct. 1335, ... U.S. .... (1968). The plaintiffs brought an action for declaratory and injunctive relief in the United States District Court. They sought a declaratory judgment decreeing that the Mississippi Anti-Picketing Law was void on its face as an overly broad and vague regulation of expression. They also sought a perma-

nent injunction restraining the defendants—the governor and other Mississippi officials—from enforcing the statute in pending or future criminal prosecutions. They alleged that the pending prosecutions against them for violating the statute were part of a plan of selective enforcement engaged in by defendants with no expectation of securing convictions, but solely to discourage plaintiffs from picketing to protest racial discrimination in voter registration and from encouraging Negro citizens to attempt to register to vote. At the time of the suit there were numerous criminal prosecutions pending against plaintiffs. But the Supreme Court held that the circumstances of this case were not controlled by *Dombrowski* and upheld the district court's refusal to grant the injunction. Here, unlike *Dombrowski*, the state statute was held to be a valid law. Furthermore, the Court found that the Mississippi officials had not enforced it against the plaintiffs in bad faith to harass their exercise of protected expression and without any intention of pressing the charges or any expectation of obtaining convictions. Rather, the Court held that the officials had in good faith regarded the plaintiffs' conduct as violating the statute.

We now summarize the effect of *Dombrowski* and *Cameron* on the earlier jurisprudence. In *Dombrowski* the Court carved out one of the special circumstances or exceptional cases under which a federal injunction may issue, when it held that under the peculiar circumstances of that case there was an exception to the general policy against federal injunc-

tions of state court proceedings. This may be called the "chilling effect" exception, because the irreparable injury in this case was the chilling effect on the First Amendment rights of the plaintiffs in the *Dombrowski* case, which was caused by the defendant's threat of repeated raids on SCEF's headquarters and arrest and prosecution of SCEF's officials. But the fact that a constitutional right has allegedly been infringed, standing alone, is not enough to come within the chilling effect doctrine. For the Court in the *Dombrowski* case said, "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial appplication of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." 380 U.S. 479, 484-485, 85 S.Ct. 1116, 1120. Rather, in order to come within this exception the plaintiff must show that the prosecution has been brought against him, not because the defendants in good faith believe that he has violated Louisiana's conspiracy statute, but in bad faith, knowing that he did not commit the crime of conspiracy, in order to harass the plaintiff in the exercise of his First Amendment rights without any expectation of obtaining a valid conviction. It is not enough for the plaintiff to allege that he is innocent of state charges in order to obtain injunctive relief. As the Supreme Court said in *Cameron v. Johnson, supra*, 88 S.Ct. at 1341:

> "[T]he question for the District Court was not the guilt or innocence of the persons

charged, the question was whether the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights. The mere possibility of erroneous application of the statute does not amount 'to the irreparable injury necessary to justify a disruption of orderly state proceedings.' Dombrowski v. Pfister, supra, 380 U.S. at 485, 85 S.Ct. at 1120. The issue of guilt or innocence is for the state court at the criminal trial; the State was not required to prove appellants guilty in the federal proceedings to escape the finding that the State had no expectation of securing valid convictions."

Turning now to the case before us, there can be no question that the plaintiff has alleged that he is the victim of a prosecution conducted in bad faith. In his complaint he alleges that the defendants "have not acted in good faith, but to the contrary, they have charged plaintiff and caused him to be indicted solely and only for the purpose of using him as a vehicle to the forum which they sought for their attacks on the Warren Report. He is a 'patsy' or a 'pawn' in the hands of the defendants, being used by them in furtherance of their false and fraudulent investigation of the Kennedy assassination." Surely, it cannot be doubted that these allegations if proved, would establish that the plaintiff is being prosecuted in bad faith. If the plaintiff's contentions are true, the defendants' conduct in this case would constitute serious bad faith.

But under *Dombrowski* and *Cameron* the plaintiff, in order to obtain injunctive relief must also show that his First Amendment rights are being violated. In *Cameron v. Johnson, supra,* Justice Fortas dissented and thought that the prosecutions should have been enjoined. Nevertheless, he did not contend that an injunction should issue under *Dombrowski* in the absence of First Amendment violations, but on the contrary, said, "*Dombrowski's* remedy is justified *only* when First Amendment rights, which are basic to our freedom, are imperiled by calculated, deliberate state assault." 88 S.Ct. 1335, 1338. (Emphasis added.) The plaintiff does allege that his First Amendment rights are being infringed in the following manner: he has been prohibited from leaving the jurisdiction; he has been under surveillance by the defendants and their agents; he has received threats to his life; his business and social activities, his attendance at public functions, and his appearances in public life generally have been restricted; his neighbors and friends have been subjected to interrogation, surveillance, and harassment; the defendant Garrison has made public and private statements that the plaintiff would either commit suicide or be killed prior to trial; the plaintiff fears arrest and/or entrapment; the defendant Garrison has made repeated public and private statements that there is no way that the plaintiff can be acquitted; the telephone of plaintiff and his associates has been tapped; there has been electronic intrusion into plaintiff's home; there has been repeated public speculation, as well as statements by the defendants and others, about

his private life, conduct and habits; the plaintiff has been held up to ridicule by the defendants and the public at large because of the groundless charge brought against him; he has been made the subject of undue and extensive surveillance and investigation of his private life by parties unknown to him, as a result of which he alleges that his right of freedom of expression, thoughts and actions has been obliterated; he fears for his safety and has to accept police protection when making court appearances; he is unable to obtain gainful employment; his attorneys have been subjected to publicized vitriolic attacks by defendants; and the plaintiff fears to occupy his homestead.

Some of the matters alleged, such as the prohibition from leaving the jurisdiction and the restriction of plaintiff's business and social activities, are merely part of the "injury incidental to every proceeding brought lawfully and in good faith," *Cameron v. Johnson, supra,* 88 S.Ct. at 1339. However, even though all of these allegations, if proved, would show that the plaintiff has suffered injury and injustice because of the prosecution, a plaintiff seeking Dombrowski relief must also show that the bad faith prosecution has been brought for the purpose of continuing harassment in order to discourage him in the exercise of his First Amendment rights. Here the plaintiff contends that the defendants' "actions are part of a plan to employ illegal searches and seizures and threats of prosecution under color of the statute to harass plaintiff, and to discourage others of his class,

from asserting his rights to free speech and assembly, as guaranteed to him by the First Amendment to the Constitution of the United States." Plaintiff discusses his claim in more detail when he refers to "defendants' plan to employ arrests, seizures and threats of prosecution, under color of various Louisiana statutes, including but not limited to LRS 14:26, to harass any and all individual citizens who disagree with their theories as to the assassination of President Kennedy, how the assassination came about, who participated in the assassination, the political consequences of the death of the President, the integrity of the investigating officers, and the integrity of the members of the Warren Commission." There is no suggestion by plaintiff that the prosecution has the effect of continuous harassment in the exercise by him of protected expression in the *Dombrowski* context. His right of such expression has not been impaired. During the oral hearing on this motion, counsel for plaintiff informed the Court that the plaintiff has never publicly taken a stand either for or against the Warren Report, nor has he made any public statements about his theories on the assassination of President Kennedy. It is clear that the prosecution was not instituted for the purpose of discouraging the plaintiff in the exercise of his First Amendment rights. Accordingly, we hold that plaintiff has failed to bring his case within the ambit of the *Dombrowski* decision.

Plaintiff also alleges that the defendants "are not motivated by any expectation of obtaining a valid

conviction . . ." But in several parts of his complaint plaintiff indicates that he fears that he may be convicted. In Paragraph 41 he states that should he be convicted, he will suffer irreparable injury from the publicity which will attend such a conviction. In Paragraph 51 of his complaint he states that he "will have his liberty placed in jeopardy by standing trial" in the state court. In Paragraph 58 he states that he will suffer irreparable injury "in the event of his conviction . . ." And in Paragraph 59 he notes the possibility of being incarcerated without bail pending appeal from a conviction. All of the actions which the defendants have taken, since they obtained a ruling at the close of the preliminary hearing that there was probable cause to justify continuing the prosecution against the plaintiff, indicate that they are striving for a conviction. It should be noted in this respect that this case had been set for trial by the defendants on June 11, 1968, before a temporary restraining order was granted against further prosecution of this case.

Nor do we believe that the plaintiff's alleged injury is irreparable. An acquittal in the state court would end the alleged injury. And our holding that an injunction shall not issue does not preclude the plaintiff from ultimate federal review of the state court proceedings and relief from any unjust consequences which he may suffer during such proceedings. Review of the plaintiff's trial may be obtained by appeal to the Louisiana Supreme Court, writ of certiorari to the United States Supreme Court, and

by writs of habeas corpus to the state and federal courts. Furthermore, the plaintiff may well be acquitted at the trial.

In *City of Greenwood v. Peacock*, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966), the Supreme Court held that a state criminal prosecution could not be removed from state court to federal court, even though the defendants claimed that "they are being prosecuted on baseless charges solely because of their race . . ." The Court was of the opinion that if these allegations were true, "there has been an outrageous denial of their federal rights," but added that "the federal courts are far from powerless to redress the wrongs done to them." 384 U.S. at 828, 86 S.Ct. at 1813. The Supreme Court said that "there are many other remedies available in the federal courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they alleged in their removal petition." 584 U.S. at 829, 86 S.Ct. at 1813. The Court further said:

> "If they go to trial and there is a complete absence of evidence against them, their convictions will be set aside because of a denial of due process of law. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654. If at their trial they are in fact denied any federal constitutional rights, and these denials go uncorrected by other courts of the State, the remedy of federal habeas corpus is freely available to them. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 837. If

their federal claims at trial have been denied through an unfair or deficient fact-finding process, that, too, can be corrected by a federal court. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770.

"Other sanctions, civil and criminal, are available in the federal courts against officers of a State who violate the petitioners' federal constitutional and statutory rights. Under 42 U.S.C. § 1983 (1964 ed.) the officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492." 384 U.S. at 829-830, 86 S.Ct. at 1813-1814.

We believe that the Supreme Court's reasoning concerning removal in the *Peacock* case is equally applicable here and that plaintiff will have ample opportunity to obtain ultimate federal relief from any injuries he may suffer as a result of the possible deprivation of his constitutional rights in the state court prosecution, should he fail to achieve vindication of his rights in the state court proceedings.[19]

Summary judgment is appropriate here without an evidentiary hearing because the pleadings and ex-

[19] Plaintiff's counsel in brief p. 42 erroneously states that the present case has been removed from the state court and therefore there are no presently pending state proceedings which would bar an injunction under §2283. This is probably an inadvertance by counsel since it is quite clear there has been no removal of the state proceedings to the federal court.

hibits adequately set forth the details and facts of plaintiff's case. Counsel for plaintiff has followed the Louisiana practice of articulating all of the facts in his verified pleadings, as is required by Article 854 of the Louisiana Code of Civil Procedure,[20] and therefore, we are apprised of the nature of plaintiff's case in ultimate detail. The complaint as amended consists of 58 pages and 125 allegations. We have been informed by counsel for plaintiff that they would use every witness in this case that they would call in the state court trial. We have accepted all well pleaded facts as true, but we have nevertheless concluded that plaintiff is not entitled to injunctive relief under *Dombrowski* and *Cameron*.

Plaintiff also contends that 28 U.S.C. §2283 does not bar injunctive releief which he seeks under 42 U.S.C. §1983.[21] He argues that §1983 is an exception to the provisions of §2283 which forbids a United States Court to grant an injunction to stay state court proceedings "except as expressly authorized by Act of Congress . . ." But we need not pass on this ques-

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[20] "Art. 854. *Form of pleading*

No technical forms of pleading are required.

All allegations of fact of the petition, exceptions, or answer shall be simple, concise, and direct, and shall be set forth in numbered paragraphs. As far as practicable, the contents of each paragraph shall be limited to a single set of circumstances."

[21] "42 U.S.C. §1983 *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. §1979."

tion in view of our holding above that the injury that plaintiff has alleged is not irreparable. The Supreme Court has not yet found it necessary to pass on this matter.[22] But it is apparent from an examination of some of the cases dealing with the question of federal injunctions of state court prosecutions that even if we found that §1983 is an expressly authorized exception to §2283, we should not grant injunctive relief in the absence of exceptional circumstances showing irreparable injury without which federal courts have been reluctant to enjoin state court prosecutions. One writer has commented that the question of whether §1983 is an exception to §2283 is "largely academic" because even "where the anti-injunction statute does not apply, federal courts have been reluctant to interfere in state matters in the area of civil rights except in extraordinary circumstances."[23]

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[22] See *Dombrowski v. Pfister, supra,* at 380 U.S. 484, 85 S.Ct. 119-120, footnote 2, and *Cameron v. Johnson, supra,* at 88 S.Ct. 1337, footnote 3. But there are several federal cases in which this point has been considered. The Third Circuit held that §1983 does constitute an exception to §2283 in *Cooper v. Hutchinson,* 184 F.2d 119 (3rd Cir., 1950), and this case was followed by a district court in the same circuit in *Tribune Review Publishing Company v. Thomas,* 153 F.Supp. 486 W.D. Pa., 1957). Cases in which it was held that §1983 does not constitute an exception to §2283 are *Baines v. City of Danville,* 337 F.2d 579 (4th Cir., 1964); cert. den. *Chase v. McClain,* 381 U.S. 939, 85 S.Ct. 1772, 14 L.Ed.2d 702 (1965); *Smith v. Village of Lansing,* 241 F.2d 856 (7th Cir., 1957); *Goss v. State of Illinois,* 312 F.2d 257 (7th Cir., 1963); *Sexton v. Barry,* 233 F.2d 220 (6th Cir., 1956), cert. den. 352 U.S. 870, 77 S.Ct. 94, 1 L.Ed.2d (1956); *Brooks v. Briley,* 274 F.Supp. 538 (M.D.Tenn., 1967), aff'd, 88 S.Ct. 1671 (1968); *Sheridan v. Garrison,* 273 F.Supp. 673 (E.D.La., 1967); and *Cameron v. Johnson,* 262 F.Supp. 873 (S.D.Miss., 1966), aff'd on other grounds, 88 S.Ct. 1335 (1968).

[23] Note, Incompatibility—The Touchstone of Section 2283's Express Authorization Exception, 50 Va. L.Rev. 1404, 1427-1428 (1964).

In this context it should be pointed out that in *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943), the Supreme Court held that the plaintiffs had successfully invoked jurisdiction under the predecessor statutory provision to §1983. Nevertheless, it refused to grant an injunction in the absence of extraordinary circumstances. In *Stefanelli v. Minard*, 342 U.S. 117, 230, 72 S.Ct. 118, 120, 96 L.Ed. 138 (1951), the Supreme Court warned that:

> ". . . even if the power to grant the relief here sought may fairly and constitutionally be derived from the generality of language of the Civil Rights Act [which question the Court refrained from deciding], to sustain the claim would disregard the power of courts of equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the wisdom of using their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the crminal law for the prosecution of crimes solely within the power of the States."

In *Cooper v. Hutchinson*, 184 F.2d 119 (3rd Cir., 1950) the Third Circuit Court of Appeals would not grant injunctive relief in spite of the fact that they held that §1983 is an expressly authorized exception to §2283. In denying injunctive relief it said:

"Nevertheless, this is a suit in equity. The giving of the peculiarly characteristic remedies available in equity lie in a chancellor's discretion, subject, of course, to review. We think a chancellor's discretion in this case requires a withholding of his arm from interfering at a preliminary stage in state litigation, at least until it has become apparent that state procedure cannot avert irreparable harm to these appellants. The Supreme Court has warned us constantly about interfering in the delicate matter of the balance between state and national authority. The 'arrest by the federal courts of the processes of the criminal law within the states * * * [is] to be supported only on a showing of danger of irreparable injury 'both great and immediate.' Douglas v. City of Jeannette . . ." 184 F.2d at 124.

Therefore we have concluded that it is unnecessary to make a definitive finding on the difficult legal question as to whether §1983 is an exception to §2283 under the circumstances here presented.

IV.

Plaintiff also seeks a declaratory judgment decreeing that LSA-R.S. 14:26, the Louisiana conspiracy statute under which he is being prosecuted, is unconstitutional. He also seeks a declaration of the unconstitutionality of the following Louisiana provisions: Articles 402, 403, 409, and 413 of the Louisiana Code

of Criminal Procedure, and Article VII, Section 41, of the Louisiana Constitution of 1921, which provisions are concerned with qualifications and manner of selection of jurors; Articles 433 and 434 of the Code of Criminal Procedure, concerning grand jury proceedings; Articles 484 and 485 of the Code of Criminal Procedure, dealing with bills of particulars; Articles 627 and 912 of the same Code, which deny a defendant the right to appeal from the denial of a motion for change of venue; and Article 782 of the Code of Criminal Procedure, which provides that cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict.[24] Of the preceding provisions being challenged here, only three, namely, Articles 402 and 409 of the Code of Criminal Procedure, and Article VII, Section 41, of the Louisiana Constitution of 1921, were challenged in the state court proceedings. It is a curious circumstance that the constitutionality of the conspiracy statute under which the plaintiff was indicted and is being prosecuted has not been questioned by the plaintiff in the state court. Therefore, it is before us for initial consideration of its constitutionality.

Plaintiff relies principally upon the decision of *Zwickler v. Koota*, 389 U. S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967), in asserting that he is entitled to independent consideration of this portion of the complaint, regardless of our determination as to the merits of his request for injunctive relief.

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[24] The full text of these provisions is set forth in Notes 1-13, supra.

Zwickler v. Koota involved the abstention doctrine, under which a federal court may abstain from determining the constitutionality of a state statute when that provision is subject to an interpretation by a court of that state which would cure it of any alleged infirmities and thereby erase the constitutional challenge.[25] In the *Zwickler* case a New York statute made it a crime to distribute in quantity certain types of political handbills for another person without printing on the handbills the name and address of the person for whom the handbills were being distributed. The plaintiff had been prosecuted under this statute, but his conviction was reversed in the state court on state law grounds. Subsequently, even though no state prosecution was pending and none was actually threatened (the plaintiff assumed, without offering any evidence to that effect, that the defendant intended to prosecute him if he distributed anonymous handbills in the future),[26] plaintiff brought suit in fed-

[25] The doctrine of abstention was first promulgated by the Supreme Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941). In that case the Court stated that if a federal district court passes on the constitutionality of a statute which is subject to a construction by a state court which would remove the alleged constitutional infirmities, "no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination." 312 U. S. at 499, 61 S. Ct. at 645.

[26] In *Zwickler v. Koota*, 261 F. Supp. 985, 988 (E. D. N. Y., 1966), the three-judge district court stated that the plaintiff "presumes to read Mr. Koota's mind by alleging that Mr. Koota 'pursuant to his duties intends or will again prosecute the plaintiff for his [intended] acts of distribution' of anonymous political literature. He regards this presumption as 'the threat of prosecution' which places him 'in fear of exercising his right to make distribution as aforesaid' and which places him 'in fear of again being prosecuted therefor.'"

eral court seeking a declaratory judgment that the statute was unconstitutional on its face as an infringement upon free expression, and an injunction prohibiting future prosecution of the plaintiff under that statute. Plaintiff contended that the statute was void because of "overbreadth" in that its sweep embraced anonymous handbills both within and outside the protection of the First Amendment. But a three-judge federal district court applied the doctrine of abstention and dismissed the suit. The Supreme Court reversed and held that the doctrine of abstention could not properly be invoked. The district court had thought that this statute was susceptible to a construction by the state courts which would avoid the constitutional question. But the Supreme Court found that such a construction was impossible in this case; saying, "Appellee does not contest appellant's suggestion that §781-b [the New York statute in question] is both clear and precise; indeed, appellee concedes that state court construction cannot narrow its allegedly indiscriminate cast and render unnecessary a decision of appellant's constitutional challenge." 88 S. Ct. 391, 396-397. The Court then stated the general rule applicable to the doctrine of abstention:

> "'* * *Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. * * *' " *Id.* at 397.

The district court also thought that the special circumstances necessary for an injunction to issue under the holding in *Douglas v. City of Jeannette*, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 (1943), should be present if the declaratory judgment was to be rendered. But the Supreme Court held that this, too, was error and said that "a Federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Id.* at 391.

However, despite the language of *Zwickler*, we entertain serious doubts about the appropriateness of stopping a pending state court prosecution to consider a request of plaintiff for a declaratory judgment as to the constitutionality of R.S. 14:26, the conspiracy statute under which he is being prosecuted. Although *Zwickler* stated that the doctrine of abstention could not be invoked in the circumstances of that case, it did not nullify the well-settled rule that the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, is discretionary, rather than mandatory, and declaratory relief may be withheld by the district court in its discretion in appropriate cases.[27] This principle was stated by the Supreme

[27] See *Malone v. Emmet*, 278 F. Supp. 193, 200 (M. D. Ala., 1967), in which the court declined to grant a declaratory judgment as to the constitutionality of a state criminal procedure statute, even though declaratory relief was coupled with a request for an injunction of a pending prosecution and *Zwickler* had been decided by the Supreme Court three weeks previously. The court relied upon the discretionary nature of declaratory relief in coming to its decision.

Court in *Public Affairs Associates, Inc. v. Rickover*, 369 U. S. 111, 112, 82 S. Ct. 580, 582, 7 L. Ed. 2d 604 (1962).

> "The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so. [citing cases] Of course a District Court cannot decline to entertain such an action as a matter of whim or personal disinclination. 'A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest.' Eccles v. Peoples Bank, 333 U. S. 426, 431, 68 S. Ct. 641, 644, 92 L. Ed. 784. We have cautioned against declaratory judgments on issues of public moment, even falling short of constitutionality, in speculative situations. Eccles v. Peoples Bank, supra, at 432, 68 S. Ct. at 644."[28]

Our doubt about the propriety of giving consideration to the request for declaratory relief in the circumstances of this case is based upon our concern that by permitting a defendant to interrupt a state court prosecution to challenge the statute un-

[28] In *Abbott Laboratories v. Gradner*, 387 U. S. 136, 155, 87 S. Ct. 1507, 1519, 18 L. Ed. 2d 681 (1967), the Supreme Court said, "A court may even in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere." Generally, a court may, in its discretion, refuse to grant a declaratory judgment if the issues raised may be fully adjudicated in a suit pending in a state court at the time the federal declaratory judgment action was instituted. 1A Moore's Federal Practice ¶0.220 at p. 2603.

der which he is being prosecuted, we could open the door to constant disruption of state court criminal proceedings. Ingenious counsel for a defendant in a state criminal prosecution would not find it difficult to phrase his defense in terms of constitutionality so as to make it possible to bring a suit for declaratory relief in a federal district court during the pendency of a state court prosecution. This might well do violence to the strong federal policy of comity as expressed by the Supreme Court in *Stefanelli v. Minard*, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951) and *Cleary v. Bolger*, 371 U. S. 392, 83 S. Ct. 385, 9 L. Ed. 2d 390 (1963).[29]

[29] A somewhat comparable situation is found in the efforts of convicted state prisoners to seek declaratory relief in the federal courts. The rule is well established in several circuits that a defendant convicted of a crime should not be permitted to utilize the declaratory judgment procedure as a weapon with which to dispense with the requirement that he exhaust his state remedies before coming into federal court or as a substitute for appeal or habeas corpus. A good statement of this general rule was given by the Eighth Circuit Court of Appeals in *Waldon v. State of Iowa*, 323 F. 2d 852, 853 (8th Cir., 1963):

"A state prisoner is not entitled to seek a declaratory determination from the federal courts under 28 U.S.C.A. § 2201 as to the validity of the judgment on which he is confined. If the restraint in which he is held is constitutionally invalid, the federal courts have the power to release him therefrom in habeas corpus, after exhaustion by him of such state remedies as are available to him. He cannot resort to a federal declaratory judgment suit in an effort to escape having to exhaust available state remedies and to circumvent the intent manifested by Congress in 28 U.S.C.A. § 2254 that the state courts are to be given 'the opportunity to pass upon and correct errors of federal law in the state prisoner's conviction', Fay v. Noia, 372 U. S. 391, 438, 83 S. Ct. 822, 848, 9 L. Ed. 2d 837."

In *Forsythe v. Ohio*, 333 F. 2d 678, 679 (6th Cir., 1964), the Sixth Circuit Court of Appeals stated, "We are satisfied that the Declaratory Judgment Act, 28 U.S.C.A. § 2201, cannot be used as a substitute for appeal, habeas corpus, coram nobis or other procedures enjoying currency among the many now

Another reason which causes us to doubt whether declaratory relief should be entertained here is the fact that there are certain differences between the circumstances in *Zwickler* and those in the case before us. In *Zwickler* there was no pending prosecution and no evidence of a real threat of future prosecution. Furthermore, *Zwickler* was concerned with a substantial attack on a statute which on its face allegedly violated First Amendment rights because of its restraints upon anonymous handbills.[30] In this regard the Supreme Court said in *Zwickler:*

> "These principles have particular significance when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment. In such case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very con-

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seeking release from prison." Other recent cases holding that the federal district court may refuse to grant declaratory relief to review convictions before state remedies have been exhausted are *Benson v. State Board of Parole & Probation,* 384 F. 2d 238 (9th Cir., 1967); *Booker v. State of Arkansas,* 380 F. 2d 240 (8th Cir., 1967); *Scruggs v. Henderson,* 380 F. 2d 981 (6th Cir., 1967); *United States ex rel Bennett v. People of the State of Illinois,* 356 F. 2d 879 (7th Cir., 1966), cert. den. 384 U. S. 946, 86 S. Ct. 1472, 16 L. Ed. 2d 544 (1966); and *Shannon v. Sequeechi,* 365 F. 2d 827 (10th Cir., 1966), cert. den. 386 U. S. 481, 87 S. Ct. 1175, 18 L. Ed. 2d 225 (1967), reh. den., 386 U. S. 1014, 87 S. Ct. 1354, 18 L. Ed. 2d 452 (1967).

[30] In *Malone v. Emmet,* 278 F. Supp. 193, 200 (M. D. Ala., 1967), the court said, "[A]s the Court in *Zwickler* was careful to observe, the asserted constitutional act was the First Amendment guarantee of free speech. The Supreme Court in *Zwickler* . . . places free speech and other First Amendment rights in a special category."

stitutional right he seeks to protect." 88 S. Ct. at 397-398.

However, we do not believe that the conspiracy statute can be the object of a valid or substantial attack on First Amendment grounds.

Nevertheless, despite our serious misgivings about considering the request for declaratory relief, we have concluded to rule on the constitutionality of the conspiracy statute. LSA-R.S. 14:26, the Louisiana conspiracy statute, provides.

"Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime: provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.

"Where the intended basic crime has been consummated the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar a prosecution for the other.

"Whoever is a party to a criminal conspiracy to commit a crime punishable by death or life imprisonment, shall be imprisoned at hard labor for not less than one nor more than twenty years.

"Whoever is a party to a criminal conspiracy to commit the crimes of theft or of receiving stolen things shall be fined not more than two hundred dollars, or imprisoned for not more than one year, or both.

"Whoever is a party to a criminal conspiracy to commit any other crime shall be fined or imprisoned, or both, in the same manner as for the offense contemplated by the conspirators; but such fine or imprisonment shall not exceed one-half of the largest fine, or one-half the longest term of imprisonment prescribed for such offense, or both."

This statute is not unique. In fact, it is merely a restatement of the common-law crime of conspiracy. It is similar to the federal conspiracy statute, 18 U.S.C. § 371, which provides in part:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Basically, there is very little to distinguish between these two statutes. Both require a conspiracy between two or more people to commit a crime and both further provide that one of the parties to the conspiracy must do an act to effect, or in furtherance of, the object of the conspiracy.

As the Supreme Court pointed out in *Scales v. United States*, 367 U. S. 203, 225, 81 S. Ct. 1469, 1484 (1961), the concept of conspiracy "manifest[s] the more general principle that society, having the power to punish dangerous behavior, cannot be powerless against those who work to bring about that behavior." See also *Johnson v. Lee*, 281 F. Supp. 650, 655 (D. Conn., 1968).

One of the plaintiff's contentions is that the word "crime" in the Louisiana conspiracy statute (a part of the Louisiana Criminal Code) is not defined. But LSA-R.S. 14:7, also a part of the Louisiana Criminal Code, states "a crime is that conduct which is defined as criminal in the Code or in other acts of the Legislature or in the Constitution of this state." The Reporter's Comment to 14:7 states that the Louisiana criminal law is purely statutory and that there are no other crimes than those defined in the Code or other statutes of this State.[31] We see no constitutional infirmity in defining "crime" in this manner. In fact, a definition of this sort is much more precise

[31] It is well settled under the Louisiana jurisprudence that "[w]e have in this state no common-law crimes. Nothing is a crime which is not made so by express statute," *State v. Robinson*, 143 La. 543, 78 So. 933, 937 (1918). "[I]t is well-settled that no act or conduct, however reprehensible, is a crime in Louisiana unless it is defined and made a crime clearly and unmistakably by statute." *State v. Sanford*, 203 La. 961, 14 So. 2d 778, 781 (1943). In *State v. Arkansas Louisiana Gas Company*, 227 La. 179, 78 So. 2d 825, 827 (1955), the Supreme Court of Louisiana said, "It is so axiomatic, that citation of authority is unnecessary, that in Louisiana there are no common-law crimes, and that nothing is a crime, no conduct can be held criminal, which is not made so by statute and clearly described by the language of its prohibition."

than a general definition, since there can be no crime which is not found in Louisiana's statutory law.

The plaintiff also contends that 14:26 is violative of the First Amendment to the United States Constitution because it punishes a person for merely expressing his thoughts about committing a crime. However, the statute does not punish a person for saying he would like to commit a crime, but only for entering into an "agreement or combination" with one or more other persons to commit a crime. Such an agreement is much more than the mere expression of one's thoughts; it is conduct which leads directly to criminal consequences and against which society has the right to protect itself. We are of the opinion, therefore, that plaintiff has demonstrated no constitutional invalidity to the Louisiana conspiracy statute.

We believe that it is obviously improper to rule on the constitutionality of the numerous procedural statutes challenged by the plaintiff. The plaintiff is not being prosecuted under these statutes so *Zwickler* is inapplicable. Furthermore, what we have already said about the federal policy against the needless disruption of orderly state court criminal proceedings applies even more forcefully. The constitutionality of these statutes may properly be ruled upon by the state court, and it should again be noted that of the twelve provisions which the plaintiff is challenging on constitutional grounds in this proceeding, he has questioned the validity of only three of these laws in the state court proceeding.

Nor should we grant a declaratory judgment decreeing that the Warren Report is binding upon all courts of the United States, including the Louisiana State Court in which the prosecution is pending. The same applies to the request that we order the defendant to furnish certain documents to plaintiff. No authority has been cited nor have we found any that would authorize this relief as to these requests.[32]

Our adverse ruling to plaintiff should not be construed as an intimation of any view whatsoever on the merits of the pending criminal charge against him. As a matter of law, plaintiff Shaw's request for relief in the federal court is premature, for under our system of federalism in the circumstances presented here, he must first seek vindication of his rights in the state courts as to this pending prosecution.

The motion to dismiss, which we have considered as a motion for summary judgment, is granted and the plaintiff's suit is dismissed.

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[32] The plaintiff has also moved to compel some of the defendants to answer certain questions asked them in the course of depositions, and the defendants have moved to have all of the defendants except Jim Garrison dropped from these proceedings. However, it is not necessary to rule on these motions since they have become moot by virtue of our rulings on the other issues in this case.

Date: July 23, 1968.

ROBERT A. AINSWORTH, Jr.,
UNITED STATES CIRCUIT
JUDGE
FREDERICK J. R. HEEBE
UNITED STATES DISTRICT
JUDGE
JAMES A. COMISKEY
UNITED STATES DISTRICT
JUDGE

HEEBE, District Judge, concurs, and will hand down a concurring opinion.

APPENDIX C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION No. 68-1063, SECTION "B"

CLAY L. SHAW,

Plaintiff,

versus

JIM GARRISON, individually, and as District Attorney for the Parish of Orleans, State of Louisiana; and JAMES L. ALCOCK, individually, and as Executive Assistant District Attorney for the Parish of Orleans, State of Louisiana, and CHARLES R. WARD, individually, and as an Assistant District Attorney for the Parish of Orleans, State of Louisiana,

Defendants.

Before AINSWORTH, Circuit Judge, and HEEBE and COMISKEY, District Judges.

PER CURIAM:

In the unanimous decision of this Court on July 23, 1968, we decided that plaintiff Shaw was not entitled to an injunction against defendant District Attorney Garrison, barring Shaw's prosecution in the Louisiana State Court for the commission of an alleged crime against the State of Louisiana. Accordingly, we ordered Shaw's suit dismissed. We remain of that view, and nothing has happened to change our opinion, which we herewith reaffirm, that the suit should have been dismissed.

However, plaintiff Shaw has now filed his notice of appeal to the United States Supreme Court, in accordance with applicable law, and has also filed his motion with this Court for an injunction pending appeal, restraining further prosecution in the Louisiana State Court until his appeal can be disposed of by the United States Supreme Court. In the meanwhile, we are informed that the pending State prosecution against Shaw has been set for trial at the instance of defendant Garrison, on September 10, 1968.

It is obvious that Shaw's appeal to the United States Supreme Court cannot be considered and disposed of prior to September 10, 1968, and that unless the prosecution is stayed, Shaw's appeal will become moot without having a chance for its consideration by the United States Supreme Court. In effect, Shaw will thus be deprived of an appeal from our decision.

We have fully considered the written response of defendant Garrison, in opposition to plaintiff's motion. Nevertheless, we are of the view that Shaw is entitled to have his appeal determined by the United States Supreme Court, under the circumstances presented by this case, and that our failure to grant him an injunction against the State prosecution pending appeal would deprive him of his right of appeal since it would thereby become moot.

We have, therefore, entered the attached order enjoining the prosecution pending Shaw's appeal to the United States Supreme Court.

ROBERT A. AINSWORTH, JR.
UNITED STATES CIRCUIT
JUDGE

FREDERICK J. R. HEEBE
UNITED STATES DISTRICT
JUDGE

JAMES A. COMISKEY
UNITED STATES DISTRICT
JUDGE

Date: Aug. 13, 1968.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION No. 68-1063, SECTION "B"

CLAY L. SHAW,

Plaintiff,

versus

JIM GARRISON, individually, and as District Attorney for the Parish of Orleans, State of Louisiana, and JAMES L. ALCOCK, individually, and as Executive Assistant District Attorney for the Parish of Orleans, State of Louisiana, and CHARLES R. WARD, individually, and as an Assistant District Attorney for the Parish of Orleans, State of Louisiana,

Defendants.

ORDER GRANTING INJUNCTION PENDING APPEAL.

This cause came on to be further heard on motion of plaintiff for an injunction pending appeal, and it appearing to the Court that the relief herein granted is necessary to preserve plaintiff's rights, pending appeal by the plaintiff to the Supreme Court of the United States, for the reasons appearing in the findings of fact and conclusions of law filed herewith,

IT IS ORDERED that, until such time as the plaintiff's appeal has been disposed of by the United States Supreme Court, the defendants be and they are hereby restrained and enjoined from further prosecution of the case entitled "State of Louisiana vs. Clay L.

Shaw", No. 198-059 of the Docket of the Criminal District Court for the Parish of Orleans, State of Louisiana.

New Orleans, Louisiana, this 13 day of August, 1968.

ROBERT A. AINSWORTH, JR.
FREDERICK J. R. HEEBE
JAMES A. COMISKEY
JUDGES

MOTION
DISMISS
AFFIRM

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OCT 14 1968

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968

No. 579

CLAY L. SHAW,

Appellant

versus

JIM GARRISON et al.,

Appellees

MOTION TO DISMISS OR AFFIRM

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CONTENTS

	Page
Statement	1
Argument	5
Conclusion	12

AUTHORITIES

Statutes:

18 USC §371	7
28 USC §2283	6, 12
42 USC §1983	12
Louisiana Code of Criminal Procedure, Article 292	2
Louisiana RS 14:26	7

Cases:

Abbott Laboratories vs Gradner, 387 US 136 (1967)	7
Cameron vs Johnson, 390 US 611 (1968)	9, 12
Cleary vs Bolger, 371 US 392 (1963)	6, 7
Dombrowski vs Pfister, 380 US 479 (1965)	9
Douglas vs City of Jeannette, 319 US 157 (1943)	13
Murdock vs Pennsylvania, 319 US 105 (1943)	13
Oklahoma Gas Co. vs Oklahoma Packing Co., 292 US 386 (1934)	13
Poresky, Ex parte, 290 US 30 (1933)	13
Public Affairs Associates vs Rickover, 369 US 111 (1962)	7
Stefanelli vs Minard, 342 US 117 (1951)	6
Thompson vs Whittier, 365 US 465 (1961)	13
Zwickler vs Koota, 389 US 241 (1967)	8

Other:

Moore's Federal Practice ¶0.220	7
Reporter's Comment following Louisiana RS 14:26	7

Supreme Court of the United States

OCTOBER TERM, 1968

No. 579

CLAY L. SHAW,

Appellant

versus

JIM GARRISON et al.,

Appellees

MOTION TO DISMISS OR AFFIRM

Appellees respectfully move that the within appeal be dismissed for want of a substantial Federal question, or that the judgment of the District Court be affirmed on the ground that it is manifest that the questions presented are so unsubstantial as not to need further argument.

Statement

Because of the diffuse nature of the statement of facts in appellant's jurisdictional statement, appellees take the liberty of restating the essential facts herein, briefly and simply.

On March 1, 1967, appellant was arrested on a charge of conspiring to murder President John F. Kennedy, in violation of the Louisiana criminal-conspiracy statute. *Complaint, Article 5.* Although his prosecution on this non-capital charge could have been instituted by a simple information filed by the District Attorney, he proceeded on a more formal, deliberate course in view of the underlying and surrounding circumstances of the case.

The District Attorney first took the unusual step of requesting a preliminary examination. *Complaint, Articles 6, 13.* While such a request may be made either by the State or by the defendant under Article 292 of the Louisiana Code of Criminal Procedure, such requests are ordinarily made by defendants.

At the conclusion of a three-day hearing, in which eyewitness evidence of appellant's participation in the asserted conspiracy was presented, a panel of three judges of the Criminal District Court held unanimously that probable cause had been established to justify criminal process against appellant. *Complaint, Articles 13, 17.* The transcript of the hearing is in the record.

Despite this judicial confirmation of his position, the District Attorney still refrained from proceeding by mere information. Instead, he presented the matter to the Parish grand jury, which returned a true bill indicting appellant on the conspiracy charge. *Complaint, Article 18* and *Exhibit A.* The indictment was returned on March 22, 1967.

On August 1, the District Attorney moved the court to fix a trial date; and appellant then moved for a continuance or change of venue on the ground that the case had been given undue publicity. The District Attorney consented to a continuance to February 1968, almost a year after the initial arrest. *Complaint, Articles 23, 28, 30* and *Exhibits G* and *J*.

In February 1968, appellant again moved for a change of venue. After what the District Court below aptly described as an "extensive evidentiary hearing" in the course of which more than eighty witnesses testified, appellant's motion was denied on April 4. *Complaint, Articles 31, 34* and *Exhibits K* and *M*.

Appellant sought review on certiorari by the Supreme Court of Louisiana, which, on April 23, denied the application, stating: "This Court will not interfere with orderly proceedings in the trial court, in the absence of a showing of irreparable injury. Relator has a remedy by appeal in the event of conviction." *Complaint, Articles 35-37; 209 So.2d 37* (1968).

The District Attorney then set the trial for June 11, 1968. *Complaint, Article 115.* On May 27, appellant filed this suit in the United States District Court for the Eastern District of Louisiana, against the District Attorney and two of his assistants, seeking to enjoin them from proceeding with the criminal prosecution in the State court. A temporary restraining order was granted.

The prolix, 60-page, 125-article complaint and amended complaint allege that many of the provisions of Louisiana's Code of Criminal Procedure—including the provisions requiring secrecy of grand jury proceedings *(Complaint, Article 60)*, and permitting excuse of women from jury duty (*Complaint, Articles 110, 114)*—are unconstitutional, and that many occurrences in the State's prosecution of appellant—including the appointment of a member of a private segregated athletic club as foreman of the grand jury (*Complaint, Articles 107-108*), and exclusion of all 26 volumes of the Warren Commission Report from evidence in the preliminary examination (*Complaint, Article 102*)—have infringed his constitutional rights. *Complaint, Articles 5, 7, 9, 19, 24, 26, 40-63, 85-89, 106-15, Amended Complaint, Articles 117-19, 122.*

The complaint also seeks a declaration that Louisiana's criminal-conspiracy statute is unconstitutionally vague. *Complaint, Articles 64-65.*

Finally, the complaint seeks Federal-court injunctive relief against further prosecution of the criminal proceeding in the State court, on the ground that the prosecution is designed solely to invade First-Amendment rights by intimidating not only appellant, but "any and all individual citizens who disagree with (the defendants') theories as to the assassination of President Kennedy", and is "not motivated by any expectation of securing a valid conviction". *Amended Complaint, Articles 120, 122(a), 125.*

But, in the event of conviction, says the complaint, appellant would be caused irreparable injury from attendant publicity and possible incarceration without bail pending appeal. *Complaint, Article 41.*

This suit for injunction was heard before a three-judge District Court on defendants' motion to dismiss, treated by the Court as a motion for summary judgment. On July 23, the Court rendered its unanimous decision dismissing the action, and the District Attorney fixed the trial of the State-court criminal proceeding for September 10.

On appellant's application, the Court below, on August 13, entered an order enjoining the prosecution of the State-court criminal action pending disposition of this appeal, stating that "'nothing has happened to change our opinion, which we herewith reaffirm, that the suit should have been dismissed", but that "nevertheless, we are of the view that Shaw is entitled to have his appeal determined by the United States Supreme Court, under the circumstances presented by this case, and that our failure to grant him an injunction against the State prosecution pending appeal would deprive him of his right of appeal since it would thereby become moot".

Argument

The correctness of the judgment below is demonstrated unanswerably in the District Court's exhaustive opinion.

A

As to the alleged procedural infirmities in the prosecution of appellant, this Court has repeatedly held that state-court prosecutions will not be enjoined in the Federal courts on this ground [*Cleary vs Bolger,* 371 US 392 (1963); *Stefanelli vs Minard,* 342 US 117 (1951)]: "If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution." *Stefanelli vs Minard, supra,* 342 US at 123-24; quoted with approval in *Cleary vs Bolger, supra,* 371 US at 397.

28 USC §2283 declares that "a court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its

judgments". An accused whose rights are infringed by procedural irregularities in a state court has ample remedies by appeal, and through state and Federal habeas-corpus proceedings: "To permit such claims to be litigated collaterally as is sought here, would in effect frustrate the deep-seated federal policy against piecemeal review." *Cleary vs Bolger, supra*, 371 US at 401.

B

The District Court's holding that the Louisiana criminal-conspiracy statute is constitutional is unassailable. This statute is modeled on the Federal conspiracy statute (18 USC §371; see Reporter's Comment following Louisiana RS 14:26), and simply codifies the common-law crime.

C

The District Court was also unassailably correct in declining to declare invalid the many provisions of the Louisiana Code of Criminal Procedure attacked by appellant. The jurisdiction conferred by the Declaratory Judgment Act is discretionary in any event. *Public Affairs Associates vs Rickover*, 369 US 111, 112 (1962). This discretion is properly to be exercised by deferring decision to another court already seized of the issue [*Abbott Laboratories vs Gradner*, 387 US 136, 155 (1967), 1A *Moore's Federal Practice* ¶0.220]. To permit such claims to be litigated collaterally in a Federal declaratory action

would be just as disruptive and frustrating as to permit the state-court prosecution to be enjoined directly.

Appellant seeks to rely on *Zwickler vs Koota,* 389 US 241 (1967), in which this Court reversed a District Court refusal to pass on the constitutionality of a state penal statute; but that decision was rightly distinguished by the District Court in the instant case. In *Zwickler* there was no pending state-court prosecution in which the issue could be resolved, and the plaintiff sought adjudication of the validity of a substantive statute under which his prosecution was threatened, which he contended was unconstitutional on its face as an infringement of First-Amendment rights, and which was not susceptible of state-court construction obviating the constitutional issue.

In the case at bar, the innumerable procedural issues raised by appellant can be (and most have already been) raised and settled in the pending prosecution itself. This phase of the case involves, not the essential constitutionality of the substantive statute under which appellant is charged, but a wholesale attack on multiple procedural provisions, which can be determined as to each, only in the context in which it has been, or may be, raised and applied.

D

Finally, appellant seeks to bring this case within the ambit of *Dombrowski vs Pfister*, 380 US 479 (1965), in which this Court carved out an exception to the long-standing rule of Federal non-interference in pending state-court criminal prosecutions.

The rationale and limitations of *Dombrowski* are stated in this Court's later opinion in *Cameron vs Johnson*, 390 US 611, 618-20 (1968): "The prosecutions there begun and threatened were not, as here, for violation of a statute narrowly regulating conduct which is intertwined with expression, but for alleged violations of various sections of excessively broad Louisiana statutes regulating expression itself. . . . Despite state court actions quashing arrest warrants and suppressing evidence purportedly seized in enforcing them, Louisiana officials continued to threaten prosecutions of Dombrowski and his co-appellants under them. In that context, we held that a case of 'the threat of irreparable injury required by traditional doctrines of equity' was made out . . . . We held further that the sections of the [Louisiana] Subversive Activities and Communist Control Law (for alleged violations of which indictments had been obtained while the case was pending in the federal court) were patently unconstitutional on their face . . . . In short, we viewed *Dombrowski* to be a case presenting a situation of the 'impropriety of [state officials] invoking the statute in bad faith to impose continuing harassment

in order to discourage appellants' activities . . . .' . . . In contrast, the District Court expressly found in this case 'that there was no harassment, intimidation, or oppression of these complainants in their efforts to exercise their constitutional rights, but they were arrested and they are being prosecuted in good faith . . . .' Any chilling effect on the picketing as a form of protest and expression that flows from good-faith enforcement of this valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms. . . . Appellants' case that there are 'special circumstances' establishing irreparable injury sufficient to justify federal intervention must therefore come down to the proposition that the statute was enforced against them, not because the Mississippi officials in good faith regarded the picketing as violating the statute, but in bad faith as harassing appellants' exercise of protected expression with no intention of pressing the charges or with no expectation of obtaining convictions, knowing that appellants' conduct did not violate the statute. We agree with the District Court that the record does not establish the bad faith charged."

The case at bar is governed by *Cameron*, not by *Dombrowski*. The substantive statute here at issue does not regulate expression itself, but, at best, verbal acts and conduct intertwined therewith (a conspiracy resulting from conversation among the conspirators). The statute is patently valid, not unconstitutional, on its face. Appellant is being prosecut-

ed, not in despite of state-court rulings indicating that the prosecution is unwarranted, but in pursuance of a state-court preliminary finding of probable cause confirmed by a grand jury indictment.

Appellant's conclusionary allegations of bad faith and unfounded harassment with no intention of prosecution or expectation of conviction, founder on the undisputed facts that the District Attorney refrained from prosecuting by information in favor of submitting his evidence first to the court on preliminary examination and then to the grand jury, both of which confirmed the existence of probable cause, and that the District Attorney has since made repeated efforts to afford appellant his constitutional right to a speedy trial—as well as by appellant's own further insistence that he is being put in jeopardy of conviction.

Appellant's contention that he has been singled out as the cynosure of the appellees' efforts to suppress comment favorable to the Warren Commission Report, is patently artificial in light of his counsel's admission to the District Court that appellant has never taken a public position as to the validity of the Report's conclusions.*

* "During the oral hearing on this motion, counsel for plaintiff informed the Court that the plaintiff has never publicly taken a stand either for or against the Warren Report, nor has he made any public statements about his theories on the assassination of President Kennedy. It is clear that the prosecution was not instituted for the purpose of discouraging the plaintiff in the exercise of his First Amendment rights." *Opinion of the District Court, page 14.*

In this case, as in *Cameron vs Johnson*, it is unnecessary to reach the question whether injunction actions brought under the Civil Rights Act (42 USC §1983) form an exception to the prohibition of 28 USC §2283, since it is clear that no valid ground for restraint of the State-court prosecution has been asserted by appellant in any event.*

Conclusion

The burden of appellant's complaint is simply that he is being subjected to the naturally galling inconveniences that are the lot of every person so unfortunate as to be the subject of a criminal prosecution. These are part of the "injury incidental to every proceeding brought lawfully and in good faith" (*Cameron vs Johnson*, 390 US at 618); and do not justify the intervention of a Federal court in contravention of 28 USC §2283.

On the contrary, this Court has consistently held that even unconstitutionality of a statute under which a prosecution has been instituted does not warrant a Federal injunction, for "no person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as

* This question did not arise in *Dombrowski* because the injunction action in that case was brought before the threatened State-court prosecution had been commenced.

readily in the criminal case as in a suit for an injunction." *Douglas vs City of Jeannette*, 319 US 157, 163 (1943), refusing to enjoin a prosecution for violation of an ordinance held unconstitutional the same day in *Murdock vs Pennsylvania*, 319 US 105 (1943).

The Federal questions presented by appellant's complaint are so clearly unsubstantial as to negate the jurisdiction of the three-judge Court below ["it is essential to (such) jurisdiction that a substantial federal question should be presented", *Ex parte Poresky*, 290 US 30, 31 (1933)], and hence that of this Court over this appeal. *Oklahoma Gas Co. vs Oklahoma Packing Co.*, 292 US 386, 392 (1934); *Thompson vs Whittier*, 365 US 465 (1961).

It is respectfully submitted that the appeal should be dismissed or that the judgment of the District Court should be affirmed.

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